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SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 84318

BAY VILLAGE HISTORIC DISTRICT COMMISSION,
JOHN G. GIANGREGORIO, LESLIE J. COLBURN,
and EDGAR M. BINGHAM, JR.

vs.

ROBERT L. FARRELL, JOSEPH J. WALSH,
JAMES K. FLAHERTY, CLARENCE J. JONES,
and MICHAEL F. DONLAN, as they are the
members of the Boston Redevelopment Authority;
AMY S. ANTHONY, as she is the Secretary of the
Executive Office of Communities and Development of
the Commonwealth of Massachusetts; THE MASSACHUSETTS
HOUSING FINANCE AGENCY; and CHINESE CONSOLIDATED
BENEVOLENT ASSOCIATION OF NEW ENGLAND, INC.

MEMORANDUM OF DECISION AND ORDER
ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

BACKGROUND

Plaintiffs seek a preliminary injunction to halt the construction of low-income housing on Parcel R-7 in Boston's South Cove Urban Renewal Area. This motion for preliminary injunction is Plaintiffs' second; the first being denied by this Court (Murphy, J.) on July 16, 1986.^{1/} Defendant Chinese

^{1/} Plaintiffs' petition for relief from the Order under G.L. c. 231, § 118 ¶ 2 was denied by Justice Smith of the Appeals Court on August 6, 1986. Bay Village Historic Dist. Comm'n, et al v. Farrell, et al., No. 86-0355-CV.

Consolidated Benevolent Association of New England ("CCBA") is a Massachusetts non-profit corporation that is redeveloping Parcel R-7 to create low-income housing. CCBA purchased Parcel R-7 from the Boston Redevelopment Authority ("BRA").^{2/} Financing for the redevelopment is being provided by Defendant Massachusetts Housing Finance Agency ("MHFA"). Defendant Executive Office of Communities and Development ("EOCD") has obtained from CCBA an option to purchase the completed development. If this option is not exercised, EOCD will provide rent subsidies to CCBA for the dwelling units to be constructed on Parcel R-7.

DISCUSSION

The Court must consider three factors before granting a preliminary injunction. The Court evaluates: (1) plaintiff's likelihood of success on the merits; (2) whether plaintiff will suffer irreparable harm if the injunction is denied; and (3) the injury defendant will suffer if the injunction is granted. See e.g., Brookline v. Goldstein, 388 Mass. 443, 447 (1983); Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616-18 (1980). Plaintiffs and Defendants have filed extensive affidavits and memoranda in support of their respective positions.

^{2/} Parcel R-7 has been designated for housing by the BRA since 1965. However, the Parcel has been used as a vegetable garden by area residents since 1977.

A. Likelihood of Success of the Merits

Plaintiffs' Complaint contains five counts. Three of the five counts are concerned with alleged violation or plans in violation of certain height limitations on the proposed construction. In essence, Plaintiffs claim that Parcel R-7 is controlled by the Bay Village Historic District Ordinance (the "Ordinance"), an enactment adopted by the Mayor and City Council in April, 1983 pursuant to G.L. c. 40C. Plaintiffs argue that the Ordinance exempts Defendant BRA's redevelopment of Parcel R-7 from the Bay Village Historic Commission's jurisdiction only if the BRA follows certain guidelines. The Ordinance contains, inter alia, the following provision:

The Boston Redevelopment Authority shall administer the development of Urban Renewal Parcel R-7 in accordance with the September, 1980 Developer's Kit (The Guidelines) for this parcel, whose guidelines are incorporated herein by reference. . . .

The Developer's Kit, Plaintiffs contend, was the product of consultation and review by members of the abutting community known as "Bay Village." This Developer's Kit contains various and eclectic criteria to be used by the BRA for judging and selecting development proposals. In particular, the Developer's Kit includes "height restrictions" which limit the height of any construction on Parcel R-7 to a maximum of three floors. Plaintiffs claim that Defendant BRA has ignored this height limitation and has allowed Defendant CCBA to proceed

with plans to construct dwellings with height in excess of three stories. Plaintiffs further claim that the rent subsidy commitment given by Defendant EOCD to Defendant CCBA is in violation of law since it is based on plans in violation of the height restriction. Additionally, Plaintiffs claim that Defendant MHFA's commitment to CCBA to act as a construction lender and a potential permanent lender for the Parcel R-7 project is also in violation of law since it likewise is based on plans in violation of the height restriction.^{3/}

Defendants argue, inter alia, that the Developer's Kit is not binding upon them; they maintain that the guidelines are advisory only. Therefore, Defendants reason, the three story height limitation is not mandatory and they are all free to perform their respective roles in the planned redevelopment of Parcel R-7.

After careful consideration of the competing affidavits and memoranda filed by both sides, this Court finds there to exist a substantial possibility of success on the merits. Cheney, supra at 617 n.12. Although Defendants have tempted the Court with persuasive defenses, Plaintiffs have shown a sufficient likelihood of success to warrant a preliminary

^{3/} This Court makes no findings nor expresses any opinion concerning the merit of Plaintiffs' counts four and five.

injunction.^{4/}

B. Irreparable Harm

Plaintiffs allege that Defendants' construction and site preparation activity will cause immediate and irreparable harm to Plaintiffs' adjacent property. More specifically, Plaintiffs maintain that when the construction company authorized by CCBA to develop Parcel R-7 begins pile-driving operations,^{5/} the owners of abutting property^{6/} will likely

^{4/} Defendants argue that this Court's denial of Plaintiff's first Motion for Preliminary Injunction (Murphy, J.) on July 16, 1986 indicated the Court's belief that Plaintiffs would unlikely succeed on the merits. Defendants' contention, however, lacks factual support. The July 16, 1986 Order denying Plaintiff's Motion for Preliminary Injunction did not state the Courts reasons for denial. The motion could have been denied for any number of reasons.

^{5/} The John B. Cruz Construction Co., Inc., retained by CCBA to begin construction on Parcel R-7, sent a letter to abutting land owners stating that they would begin construction during the week of October 27, 1986. This letter informed the abutters that the purpose of the pile-driving operation was to install metal sheathing around the perimeter of the site. The letter also acknowledged that the pile-driving may cause the ground to vibrate and requested permission to send a team of engineers on to the adjacent property to inspect the buildings' present condition. The purpose of this inspection was to better enable later evaluation of any property damage and thus avoid fraudulent claims.

^{6/} Plaintiffs' Complaint lists the following as individual plaintiffs: John G. Giangregorio, Leslie J. Colburn, and Edgar M. Bingham, Jr. Plaintiffs' Motion for Preliminary Injunction, however, lists the following as individual plaintiffs: Bruce W. Steeves, James D. Stevens, John G. Giangregorio, and Leslie J. Colborn [sic]. Although plaintiffs have filed no motion to amend the pleadings to add additional plaintiffs, this Court will allow the pleadings to be amended to reflect the addition of Bruce W. Steeves and James D. Stevens as individual plaintiffs upon proof of their status as abutting land owners.

suffer substantial harm in the form of foundation cracks, cracking of exterior brick walls, misalignment and jamming of doors and windows, and cracking of interior walls. Additionally, Plaintiffs claim that planned construction includes the building of a retaining wall on the edge of Parcel R-7 where it intersects with Plaintiffs' rear property lines. The effects of this retaining wall, Plaintiffs argue, are two-fold: First, the retaining wall's construction will extinguish a right-of-way which benefits the individual Plaintiffs; and second, the retaining wall's construction will result in increased soil stress causing cracks and other harm to adjoining structures.

"In the context of a preliminary injunction the only rights which may be irreparably lost are those not capable of vindication by a final judgment, rendered either at law or in equity." Cheney, supra at 617 n. 11. Concerning the pile-driving operation, it appears likely that the individual Plaintiffs will suffer irreparable harm. In Massachusetts, an abutting land owner can maintain a negligence action against a contractor only where the contractor fails to exercise due care to avoid reasonably foreseeable injury to surrounding buildings. Ted's Master Service, Inc. v. Farina Bros. Co. Inc., 343 Mass. 307, 309 (1961). In Ted's Master Service, the court held that there would be no recovery because plaintiff failed to show that the defendant contractor had negligently conducted its pile-driving operation. The court maintained that without a showing that those engaged in similar work

generally made ground borings, soil tests, or preliminary surveys of the surrounding buildings, then failure to take such precautions would not necessarily warrant a finding of negligence. Ted's Master Service, supra at 309-10. Plaintiff had offered no evidence showing this was the general practice. In the present case, Plaintiff's dilemma becomes quickly apparent. Unlike Ted's Master Service, the construction company has conducted soil testing and has attempted to inspect the surrounding buildings. The construction company appears to be proceeding reasonably. The problem, however, is that any concussion or vibration damage which occurs to Plaintiffs' property during the pile-driving operation will probably not be compensable. Even if the pile-driving indisputably causes Plaintiffs' homes to tumble to the ground, Plaintiffs will have no actionable harm unless they can prove negligence.^{1/} See Colangeli v. Construction Service Co., 353 Mass. 527, 528-29 (1968); Ted's Master Service, supra at 309-10; cf. Piontek v. Joseph Perry Inc., 342 Mass. 342, 342-44 (1961) (where defendants negligent demolition work caused actionable

^{1/} Nor will Plaintiffs likely recover on a nuisance theory since this requires interference that is intentional and unreasonable or results from conduct which is negligent, reckless, or ultrahazardous. See Ted's Master Service, supra at 311-12. Similarly, concussion damage in Massachusetts is not compensable on a strict liability theory. Compare Clark-Aiken Co. v. Cromwell-Wright Co., 367 Mass. 70, 83 n.14 (1975) (no strict liability for concussion damage) with Cincinnati Terminal Warehouses, Inc. v. Contractor, Inc., 324 N.E. 2d 581 (Ohio 1975) (allowing strict liability for damages proximately caused by pile-driving operations).

vibration damage to plaintiff's property). Thus, the following is a likely scenario: Construction Co. takes all reasonable precautions yet vibration causes substantial damage to Plaintiffs' property; Plaintiffs eventually win on the merits of their complaint; Plaintiff's are left without compensation for the damage caused by Defendants unauthorized construction. Clearly, this is irreparable harm.^{8/} Plaintiffs would be remediless. Concerning the retaining wall, much of the above reasoning applies. Since Defendant CCBA's engineers have taken reasonable measures before beginning construction of the retaining wall, once again Plaintiffs may suffer substantial damage to their property without any legal means of redress. In a very real and practical sense, only with a preliminary injunction can Plaintiffs be assured that they will suffer no irreparable

^{8/} Plaintiffs suggest that an injunction should issue because Massachusetts has "long recognize[d] the unique nature of real estate and for that reason [has] repeatedly and consistently afforded land owners equitable remedy specifically in the nature of injunctive relief regardless of the availability of monetary damages." Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 8. Although the courts have generally treated land as unique, damage to buildings may be compensated with monetary damages. See Ted's Master Service, supra; Piontek, supra. The irreparable harm, in this case, is not because monetary damages would not suffice, but instead because Plaintiffs will probably have no legal vehicle to recover. This is much the same as enjoining a government official from engaging in certain behavior when governmental immunity prevents a court from recognizing an action at law for damages; even though a damage remedy would compensate the plaintiff.

harm.^{9/}

C. Balance of Harm

"If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party." Cheney, supra at 617 (footnote omitted). Defendants contend that a preliminary injunction may delay construction until the spring of 1987 and perhaps sound the death knell for the construction contract. Further Defendants suggest that out-of-pocket expenses to CCBA for a six-month delay could be as high as \$250,000. Moreover, Defendants maintain, the renegotiations of a construction contract next spring could result in a higher

^{9/} Plaintiffs argue that the retaining wall's construction on the intended site would interfere with Plaintiffs established right-of-way. The Court disagrees. The site in issue was taken by the BRA pursuant to an Order of Taking dated June 26, 1986. This Order of Taking is recorded with the Suffolk Registry of Deeds in book 12632, page 18. In general, "[u]pon condemnation the condemnor is vested with a complete title and all interests in the property taken are extinguished." Silberman v. United States, 131 F.2d 715, 717 (1st Cir. 1942). Although an easement is considered property, Durgin v. Minot, 203 Mass. 26, 29-30 (1909), and therefore notice should be given before an easement is taken, G.L. c. 79, § 7C, failure to give notice does not necessarily invalidate the taking. See Merrymount Co. v. Metropolitan Dist. Comm'n, 272 Mass. 457, 464-65 (1930); 7 Op. Att'y Gen. 58 (1923). Instead, Plaintiffs have a statutory remedy. See generally, 7 Op. Att'y Gen. 58 (1923); G.L. c. 79, § 16.

project cost of as much as 10 percent.^{10/} Undoubtedly, these are worthy concerns. However, given Plaintiffs' likelihood of success on the merits plus the grave nature of their probable irreparable harm, the equities in this case favor the initial granting of a preliminary injunction. As a condition to the preliminary injunction, Plaintiffs must post a \$250,000 bond to cover economic harm suffered by CCBA in the event this Court determined an injunction is appropriate. This Court, however, will allow construction to begin immediately if Defendants post a \$1,000,000 bond to compensate plaintiffs for any substantiated harm to Plaintiffs' property should plaintiffs eventually win their case on the merits.^{11/}

ORDER

It is therefore ORDERED that Plaintiffs' Motion for Preliminary Injunction be GRANTED IF Plaintiffs post a \$250,000 bond. However, if Defendants post a \$1,000,000 bond to compensate Plaintiffs for any substantiated harm to Plaintiffs' property in the event Plaintiffs prevail on the merits, then

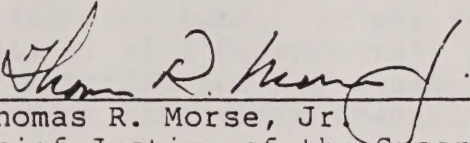
^{10/} Defendants also emphasize that the public welfare suffers from delay since twenty units of low-income housing would await indefinite postponement.

^{11/} In no way does Defendants' bond supplant or limit any other legal remedy of Plaintiffs. For example, if Defendants do negligently cause damage to Plaintiffs' property, Plaintiffs are not precluded from bringing an action in tort to recover for harm proximately caused. See Ted's Master Service, supra at 309-10. There will, however, be no double recovery.

Defendants may:

1. Conduct pile-driving operations;
2. Build the retaining wall; and
3. Proceed with any other construction necessary to complete the redevelopment of Parcel R-7.

It is further ORDERED that if Defendants choose to post the \$ 1,000,000 bond, Plaintiffs allow an inspection of their property for the purpose of facilitating verification of any potential damage claims.



Thomas R. Morse, Jr.
Chief Justice of the Superior Court

Dated: November 24, 1986

MEMORANDUM

TO: BOSTON REDEVELOPMENT AUTHORITY AND
STEPHEN COYLE, DIRECTOR

FROM: ROBERT F. McNEIL, CHIEF GENERAL COUNSEL

DATE: DECEMBER 3, 1986

RE: BAY VILLAGE HISTORIC DISTRICT COMMISSION ET AL
v. ROBERT L. FARRELL ET AL

Bay Village Historic District Commission et al ("Plaintiffs") sought a preliminary injunction in the Superior Court to halt the construction of low-income housing on Parcel R-7 in Boston's South Cove Urban Renewal Area. On November 24, 1986 it was ordered in the Superior Court that the preliminary injunction be granted if Plaintiffs posted a \$250,000 bond. It was further ordered that if Robert L. Farrell et al ("Defendants") post a \$1,000,000 bond to compensate Plaintiffs for any substantial harm to Plaintiffs' property in the event Plaintiffs prevail on the merits, then Defendants may:

1. Conduct pile-driving operations;
2. Build the retaining wall; and
3. Proceed with any other construction necessary to complete the redevelopment of Parcel R-7.

It is recommended that the Director be authorized to appeal the Superior Court decision to issue a conditional preliminary injunction to halt the construction of low-income housing on Parcel R-7 in Boston's South Cove Urban Renewal Area and further be authorized to grant up to \$100,000 to the Chinese Consolidated Benevolent Association to secure the \$1,000,000 bond required by the Superior Court order in order to proceed with the construction of low-income housing on Parcel R-7.

An appropriate Vote follows:

VOTE: That the Director be authorized to appeal the Superior Court decision to issue a conditional preliminary injunction to halt the construction of low-income housing on Parcel R-7 in Boston's South Cove Urban Renewal Area and be further authorized to grant up to \$100,000 to the Chinese Consolidated Benevolent Association to secure the \$1,000,000 bond required by the Superior Court order to proceed with the redevelopment of Parcel R-7.